No. 84-1138

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

GEORGE KEITH GARMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a defendant, over his objection, may be tried in the District of Maryland for the failure to do an act when the only place required by law for the performance of the act is the Eastern District of Pennsylvania, consistent with Article III, Section 2, Clause 3, and the Sixth Amendment of the United States Constitution?

2. Whether, in a prosecution for alleged violations of 26 U.S.C. § 7203, it is permissible under the Fifth and Sixth Amendments to the United States Constitution for the trial judge to exclude witnesses of the defense, whose testimony would be relevant to the issue of intent, because the trial judge did not want the testimony in the case to carry over until the next day?

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OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Maryland.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on November 13, 1984, and this petition was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

Constitutional Provisions

United States Constitution, Article 3, Section 2, Clause 3:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have Assistance of Counsel for his defence.

Statutory Provisions

26 U.S.C. § 7203:

> Willful failure to file return, supply information, or pay tax
>
> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return (other than a return required under authority of section 6015), keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure.

26 U.S.C. § 6091, in relevant part:

> (a) General rule. — When not otherwise provided for by this title, the Secretary shall by regulations prescribe the place for the filing of any return, declaration, statement, or other document, or copies thereof, required by this title or by regulations.
>
> (b) Tax returns. — In the case of returns of tax required under authority of part II of this subchapter—
>
> (1) Persons other than corporations—

> (A) General rule. — Except as provided in subparagraph (B), a return (other than a corporation return) shall be made to the Secretary—
>
> > (i) in the internal revenue district in which is located the legal residence or principal place of business of the person making the return, or
> >
> > (ii) at a service center serving the internal revenue district referred to in clause (i),
>
> *as the Secretary may by regulations designate.* (Emphasis added).

REGULATORY PROVISION

26 C.F.R. § 1.6091-2:

> Except as provided in § 1.6091-3 (relating to income tax returns required to be filed with the Director of International Operations) and § 1.6091-4 (relating to exceptional cases)—
>
> (a) Individuals, estates, and trusts. (1) except as provided in paragraph (c) of this section, income tax returns of individuals, estates, and trusts shall be filed with the district director for the internal revenue district in which is located the legal residence or principal place of business of the person required to make the return, or, if such person has no legal residence or principal place of business in any internal revenue district, with the District Director at Baltimore, Md. 21202.
>
> * * * * * *
>
> (b) Corporations. Except as provided in paragraph (c) of this section, income tax returns of

corporations shall be filed with the district director for the internal revenue district in which is located the principal place of business or principal office or agency of the corporation.

(c) Returns filed with service centers. Notwithstanding paragraphs (a) and (b) of this section, *whenever instructions applicable to income tax returns provide that the returns be filed with a service center, the returns must be so filed in accordance with the instructions.* (Emphasis added).

(d) Hand-carried returns. Notwithstanding paragraphs (1) and (2) of section 6091(b) and paragraph (c) of this section—

(1) Persons other than corporations. Returns of persons other than corporations which are filed by hand carrying shall be filed with the district director (or with any person assigned the administrative supervision of an area, zone or local office consulting a permanent post of duty within the internal revenue district of such director) as provided in paragraph (a) of this section.

STATEMENT OF THE CASE

George Keith Garman was charged with willful failure to file federal income tax returns for the years 1977, 1978 and 1979 in violation of 26 U.S.C. § 7203. Following a jury trial in the United States District Court for the District of Maryland, Mr. Garman was convicted and sentenced to one year's imprisonment. His conviction was affirmed in the United States Court of Appeals for the Fourth Circuit.

Prior to trial, Mr. Garman moved, pursuant to Rules 12 and 18, Federal Rules of Criminal Procedure, to dismiss the indictment on the ground that the District of Maryland was not the proper venue for the alleged

offenses. The basis for this motion was that the only place Mr. Garman was required by law to make returns for the years in question was the Internal Revenue Service Center in Philadelphia, Pennsylvania, which is located in the Eastern District of Pennsylvania. The District Court denied Mr. Garman's motion and the trial proceeded in the District of Maryland.

The only issue in the trial was whether Mr. Garman's failure to file federal income tax returns for the years 1977, 1978, and 1979 was willful. The other essential elements of the offense specified in 26 U.S.C. § 7203 were not in dispute (App. 210-211).[1] The government's evidence, therefore, centered on its contention that Mr. Garman's failure to file returns for the years under indictment was willful. The focus of Mr. Garman's defense was two-fold: (1) that he believed, albeit perhaps erroneously, that due to casualty and other losses he owed little if any tax; and (2) that despite his personal and financial problems during the years in question he made good faith attempts to have returns prepared and filed.

The Government's Evidence

The government's first witness was Joseph Tarr, a certified public accountant, who had prepared Mr. Garman's tax returns for the years 1968 through 1973 (App. 30-31). Mr. Tarr testified that for 1973, although Mr. Garman had a gross profit of $27,840 he did not owe any taxes for that year due to losses, credits, and other adjustments (App. 33-34).

Mr. Tarr next dealt with Mr. Garman's tax affairs in April 1980, when he asked Mr. Tarr to prepare his 1979 tax return (App. 35). Mr. Tarr filed two extensions of time

[1] References are to the Appendix filed in the Court below.

to file the 1979 return (App. 35-38), but it was not filed before the expiration of the periods of extension because Mr. Garman did not satisfactorily complete financial arrangements with Mr. Tarr's firm (App. 39, 41).

The government's next witness was Leonard Miller, another certified public accountant (App. 46). Mr. Garman was referred to Mr. Miller in early 1978 for the preparation of his 1977 tax return and other accounting work. Mr. Garman gave Mr. Miller a copy of his W-2 for 1977, and papers relating to mortgages (App. 48). Mr. Miller filed three extensions of time on behalf of Mr. Garman, the latter of which were necessary because Mr. Garman was out of the country when the earlier ones expired (App. 50-51, 53). Mr. Miller stated that he did not prepare Mr. Garman's 1977 return because he was not furnished sufficient information (App. 54-59).

On cross-examination, Mr. Miller recalled that in January, 1979 he was visited by Mr. Garman who pleaded with him to continue working on the 1979 return (App. 62-63). Mr. Garman brought Kathy Mikos, a secretary, with him to the meeting so that Mr. Miller could instruct her on gathering all of the necessary data (App. 63). Nevertheless, Mr. Miller refused to continue work on Mr. Garman's return. On January 16, 1979, Mr. Garman instructed Mr. Miller to transfer all information concerning him to Jerry Lichter, a certified public accountant (App. 64).

The government next called Sylvan Offit, a certified public accountant, who was retained by Mr. Garman in 1978 to prepare an unaudited financial statement in connection with the refinancing of certain properties (App. 68-69). Mr. Garman had given Mr. Offitt his W-2 for 1977 showing income of approximately $71,200 (App. 80), and had told him that the return for that year was being prepared by Mr. Miller (App. 89). Mr. Garman also

advised Mr. Offitt that he did not file returns for 1974, 1975 and 1976 because he did not have sufficient income in those years (App. 81). Mr. Offitt was not hired by Mr. Garman to prepare any tax returns (App. 83). Except for the W-2, some appraisals (which were supplied by someone else (App. 87)), and an insurance policy, Mr. Garman gave Mr. Offitt information orally and not in the form of records (App. 85-86).

Gerald Beauchesne next testified for the government about his employment with American Liner Corporation, where he had been hired by Mr. Garman in February 1979 (App. 93). American Liner was established to distribute machinery for its British parent (App. 92-93).

Until approximately September 1979, American Liner operated out of a building owned by Mr. Garman, who received rental payments of $1,500 per month (App. 95, 98, 100). Mr. Beauchesne further testified that Mr. Garman instructed that taxes not be withheld from his paychecks because Mr. Garman believed his expenses would offset his income (App. 101). Thus, Mr. Garman claimed 102 exemptions on form W-4 (App. 103). This was done on the advice of American Liner's public accounting firm (App. 103-104, 114-115). Mr. Beauchesne concluded his direct testimony by identifying Mr. Garman's W-2 forms from American Liner for the years 1978 and 1979 showing income of $40,153.80 and $86,000.00, respectively (App. 107).

On cross-examination, Mr. Beauchesne testified that Mr. Garman was not responsible for the accounting and financial records of American Liner (App. 110-112). Mr. Beauchesne also revealed that American Liner's records indicated that Mr. Garman's claiming of 102 exemption's "was predicated upon [his] having operating losses from other sources to offset [his] income from American Liner Corporation" (App. 113). Further, Mr. Garman's correct

W-2's from American Liner for 1978 and 1979 were not mailed to him until early 1980 because of adjustments made by the company's public accounting firm (App. 118).

Charles Decker was the in-house bookkeeper for American Liner from May to September 1979 (App. 123-124). Mr. Decker testified that Mr. Garman told him not to withhold taxes from his paycheck because he was hired as a consultant to American Liner (App. 125). Based on the Form W-4 claiming 102 exemptions, Mr. Decker did not withhold taxes (App. 127).

Mr. Decker remembered that Mr. Garman had asked him to help prepare returns but was unable to complete any returns due to a lack of records (App. 127-128).

Special Agent Frederick Schmoll next testified about an interview he conducted with Mr. Garman on August 29, 1980 (App. 141, 149). Special Agent Schmoll read Mr. Garman his rights and explained that he was under investigation for possible criminal tax violations (App. 142-145). Special Agent Schmoll recalled that Mr. Garman freely discussed his tax affairs and admitted outright that he had not filed returns (App. 145-147, 150-151). After a brief conversation with Special Agent Schmoll, Mr. Garman took the Special Agent first to the office of Mr. Bakas (his attorney), and then to the office of Mr. Tarr, where Special Agent Schmoll was introduced to Mr. Finley, an associate of Mr. Tarr (App. 147). Mr. Garman told both Mr. Bakas and Mr. Finley to give Special Agent Schmoll whatever information he requested (App. 151-152). Mr. Garman also agreed to provide Special Agent Schmoll information and to meet with him again, but Special Agent Schmoll made no further requests to Mr. Garman (App. 154-155).

The testimony for the first day of Mr. Garman's trial, November 22, 1982, was completed after Special Agent

Schmoll was excused. The government indicated that it had one more witness, a Revenue Agent. The defense was advised to be prepared to begin its case on November 23rd and it was estimated that the trial would conclude on November 24, 1984 (App. 161).

On November 23, 1982, the government called its final witness for its case-in-chief, Revenue Agent Martin Furman.

Mr. Garman's Evidence

At the close of the government's case-in-chief, defense counsel advised the Court that they were prepared that day to put on three witnesses, as well as begin the testimony of Mr. Garman (App. 211-212).

The first defense witness was Marion Francis, a neighbor of Mr. Garman (App. 214). Mr. Francis testified that in January 1976, while Mr. Garman was visiting his family in Ohio, Mr. Garman was evicted from his residence in Baldwin, Maryland, and his possessions thrown out in the street (App. 215).

Kathy Mikos was hired by American Liner in December 1978 (App. 220-221). Approximately three weeks after she began her employment, Mr. Garman, who was traveling extensively at the time, asked her to organize his expense account (App. 222). Mr. Garman also asked Ms. Mikos to go through some of his old records and make sure that his expense accounts were up to date (App. 222).

Ms. Mikos testified that in January 1979 she accompanied Mr. Garman to the office of Leonard Miller, the accountant (App. 222). She recalled that Mr. Miller returned Mr. Garman's records to him (App. 223-224). Ms. Mikos accompanied Mr. Garman to his attorney's office to collect some documents, and they then went to the office of Mr. Lichter, another accountant (App. 224). Ms. Mikos

recalled Mr. Garman telling her at that time that he wanted her to "get all his tax information in good order so that his accountants could take care of" preparing returns (App. 224). It was her understanding that Mr. Lichter was going to prepare the returns, and that she would assist by collecting the necessary information (App. 225). Ms. Mikos met with Mr. Lichter on approximately February 11, 1979 and was given a list of the needed information (App. 227). She thereafter went through the files in Mr. Garman's desk and boxes stored in his office and collected and organized the information (App. 228).

On cross-examination, Ms. Mikos testified that she believed Mr. Garman thought that the preparation of the returns that needed to be filed would be done by the accountants (App. 230-231). She also testified that Mr. Garman "knew it had to be done and he was scrambling as much as he could to get it done during the time that he had because . . . he was in and out quite frequently and . . . his travels were quite extensive" (App. 231).

Mr. Garman began his testimony by explaining the various types of businesses he had been associated with over the years (App. 235-243). From 1973 to 1976, Mr. Garman was not regularly employed (App. 242-243). During the first indictment year, 1977, Mr. Garman worked for J.C.B., a British company that manufactured construction equipment (App. 243). Mr. Garman was away from Maryland eighty percent of the time and, essentially, lived out of hotels (App. 246-247).

In mid-1978, Mr. Garman resigned from J.C.B. and then became associated with American Liner Corporation (App. 249-250), where his salary was to be $104,000 per year (App. 255). After joining American Liner, and until his departure from the company in October 1979, Mr. Garman spent eighty percent of his time away from Maryland (App. 256-258).

Within a month of his termination from American Liner, Mr. Garman was in financial difficulty. He had little savings and several mortgages (App. 265). The properties subject to mortgage were foreclosed upon and Mr. Garman ultimately filed for bankruptcy in March 1980 (App. 267).

Mr. Garman testified as to the eviction from his home in January 1976 (App. 270). When he returned to Maryland from Ohio he found that his tools, machinery, furniture, and personal records were gone (App. 271). Despite the obtaining of a court order recognizing Mr. Garman's right to buy the property (App. 272), the former owner had leased the property to another person who did not vacate the premises until January 1977 (App. 273). The property was not left in habitable condition: the tenant had allowed the furnace, the boiler, and all of the pipes to burst. The resulting damage was not covered by insurance (App. 274). Mr. Garman estimated that his losses from the eviction were approximately $100,000 and the damage to the property approximately $20,000 (App. 274-276).

Mr. Garman testified with respect to his 1977 return, that he believed he had substantial losses in 1976 and 1977 and wanted an accountant to sort out his tax affairs because he did have substantial income in 1977 (App. 285). Mr. Garman's attorney referred him to Leonard Miller. Mr. Garman testified that he did attempt to gather the information that Mr. Miller wanted and, that when he personally was unable to do so, brought in Kathy Mikos to assist in the collection of information (App. 287). By that time, however, Mr. Miller no longer desired to prepare the 1977 return (App. 288).

Mr. Garman then went to Mr. Lichter, who was the accountant for American Liner (App. 288-291). By the summer of 1979, however, Mr. Garman's relationship with American Liner had deteriorated and his relationship

with the company's accountants, Mr. Lichter and Mr. Decker, ended (App. 291-292).

Mr. Garman's testimony at this point was interrupted by the mid-day recess. When Court reconvened on the afternoon of November 23, 1982, the Court advised defense counsel for the first time that if the case could be finished that day they would be required to put on *all* of their witnesses that day (App. 293-295). Counsel attempted to explain to the Court that they had understood that they would be permitted to put on witnesses on November 24th and had so arranged the defense (App. 293-296). The record reflects substantial ambiguity in the Court's comments on scheduling, and the Court's unwillingness to accept any deviation from its desired schedule (App. 160-161, 293-296). Nevertheless, on the afternoon of the second day of trial, Court admonished counsel to "get somebody on the pike and get those witnesses in because we're not going to wait, assuming we get to that point." (App. 296).

When Mr. Garman resumed the stand, he testified that in July 1979 he responded to the newspaper advertisement of an accountant, Robert Thompson. Mr. Garman had several meetings with Mr. Thompson and paid him approximately $600 in connection with the preparation of the returns for 1977 and 1978 (App. 297). Mr. Thompson was unable to complete the returns due to his inability to obtain certain files (App. 297-298).

After the deterioration of his relationship with American Liner, and his eventual firing in October 1980, Mr. Garman contacted Mr. Tarr in the spring of 1980 (App. 298). Mr. Tarr assigned one of his associates, Mr. Finley, to Mr. Garman's account, and Mr. Finley began to gather the necessary information (App. 299). Upon learning that Mr. Garman was under a criminal tax investigation, however, Mr. Tarr requested a $3,000 retainer to complete

the returns (App. 300, 308, 357-358). Mr. Garman was unable to pay this fee and work on the returns was again halted (App. 300).

Mr. Garman concluded his testimony by explaining two matters brought out by the government in its case in chief. First, he testified that the reason why he desired little or no federal withholding was that he believed that because of his losses in earlier years and current interest payments he would have little or no taxable income (App. 304, 330, 341). The number of exemptions was determined by accountants, who prepared the necessary forms (App. 304-307). Secondly, Mr. Garman testified that he knew he had an obligation to file returns (App. 307, 333) and that he did his best under the circumstances to have the returns prepared (App. 308-309).

Mark Finley testified as a defense witness as to his work in connection with the preparation of Mr. Garman's returns. Mr. Finley began work on Mr. Garman's tax affairs in June 1980 at the request of Mr. Tarr (App. 354). After meeting with Mr. Garman, Mr. Finley determined that returns for 1974 through 1979 should be filed, and he began to gather information (App. 355-356). According to Mr. Finley, Mr. Garman was "very happy that he felt he had found, finally found someone who could do the job. And he was helpful inasmuch as he tried to get me everything he did have — turned that all over to me and discussed all of the information with me and tried to explain the where and the when of his tax situation in those years" (App. 358-369). When the criminal tax investigation began, however, the accounting firm determined to require an advance retainer of $3,000 (App. 357-358).

The next defense witnesses was Jerome Lichter, the former accountant for American Liner (App. 366). Mr. Lichter testified that he obtained filing extensions for Mr.

Garman's 1978 return (App. 367-368), and that he advised Mr. Garman that the claiming of a large number of exemptions was a legitimate way of preventing unnecessary withholding for a person with unusually large deductions affecting current income (App. 370-371, 374-375). Mr. Lichter also testified that taxes were not withheld from Mr. Garman's 1978 earnings from American Liner because he was considered an independent contractor (App. 373, 377).

Mr. Lichter was the last witness defense counsel were able to present on November 23, 1982, the second day of trial, after having been notified by the Court at the mid-way recess that *all* defense witnesses would have to be presented that afternoon if the testimony in the case could possible be finished. It was then 4:05 p.m. (App. 380) and the Court refused to permit the defense to call witnesses the following day. Although defense counsel had arranged for the testimony of two other fact witnesses, attorneys Charles Brooks and Constantino Bakas, they were not scheduled until the following morning and could not be produced upon such short notice (App. 378-379).

The Court permitted defense counsel to make a brief proffer of the testimony of these witnesses. Mr. Brooks, an attorney, would have testified concerning Mr. Garman's eviction and property losses in 1976. Mr. Brooks would also have testified that Mr. Garman was an independent contractor for American Liner and that he, Mr. Brooks, participated in the decision not to have withholding from Mr. Garman's earnings (App. 382).

Mr. Bakas would have testified to litigation concerning certain other loss transactions he handled for Mr. Garman, and litigation over certain real property. Mr. Bakas also would have testified about his cooperation with Special Agent Schmoll, at the request of Mr. Garman (App. 382).

After a lengthy discussion among the Court and counsel over the admission of defense exhibits (App. 383-398), the government was permitted to call one rebuttal witness, Mr. Beauchesne, on the issue of Mr. Garman's credibility. Prior to the testimony of that witness, however, there was another lengthy discussion among the Court and counsel about the admissibility of such evidence (App. 398-404).

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT REGARDING THE PROPER VENUE FOR A CRIMINAL PROSECUTION WHEN THE CRIME IS THE FAILURE TO DO AN ACT REQUIRED BY LAW.

Article III, section 2, clause 3 of the Constitution provides that federal criminal trials "shall be held in the State where the said Crimes shall have been committed." The Sixth Amendment further guarantees an accused the right to a trial "by an impartial jury of the State and district wherein the crime shall have been committed." These constitutional principles are implemented by Rule 18 of the Federal Rules of Criminal Procedure, which generally requires a trial "in a district in which the offense was committed."

Absent an express congressional direction in the statute defining the offense, the situs of a crime is to be determined "from the nature of the crime alleged and the location of the act or acts constituting it." *United States v. Anderson*, 328 U.S. 699, 703 (1946). When the offense is the failure to do an act, "the place fixed for its performance fixes the situs of the crime." *Johnston v. United States*, 351 U.S. 215, 220 (1956) (footnotes omitted).

Section 7203 of the Internal Revenue Code makes it a crime for a person to willfully fail to make a tax return at the time required by law or regulation.

Section 6091(b)(1) of the Internal Revenue Code states that returns are to be filed with the District Director of the taxpayer's residence or at an IRS service center *as the Secretary may by regulations designate*. The Secretary's regulations expressly state that "whenever instructions applicable to income tax returns provide that the returns be filed at a service center, the returns must be so filed in accordance with the instruction." 26 C.F.R. § 1.6091-2(c). It is undisputed that the instructions applicable to the income tax returns for the years subject to the indictment required the filing of those returns at the IRS Service Center in Philadelphia, Pennsylvania.

The Court below interpreted section 6091(b)(1) and the Secretary's regulations as establishing two places where returns might be filed — an Internal Revenue Service Center and the Office of the District Director for taxpayer's residence. From this premise, the Fourth Circuit concluded that since returns could have been filed in either location it was permissible to try Mr. Garman in either location for failing to file returns. Thus, under the Fourth Circuit's holding, the offense defined in section 7203 of the Internal Revenue Code could be tried in any judicial district where, under the Secretary's regulations, it is possible to make a return. The holding of the Fourth Circuit is contrary to the decisions of this Court because it equates the places where one may perform an act with that place where the act is required by law to be performed.

In *United States v. Lombardo*, 241 U.S. 73 (1916), the alleged offense was the failure to make a report to the Commissioner General of Immigration required by the White Slave Traffic Act, 36 Stat. 825, 826.

The government argued that the offense was committed in the Western District of Washington, where the prosecution was brought, because the defendant could have filed

the required statement by depositing it in the mail in the State of Washington. 241 U.S. at 76. The office of the Commissioner, however, was located in Washington, D.C. The Court held that venue was proper only in the District of Columbia on the ground that when the offense is the failure to do an act, and the place where the act is required by law to be performed is established, venue is proper only in that place and not where the act might have been performed. 241 U.S. at 76-78.

The *Lombardo* Court also rejected the "continuing offense" venue theory raised by the government. 241 U.S. 77. The Fourth Circuit, in its opinion below, invokes the same theory under 18 U.S.C. § 3237(a) that was rejected by this Court in *Lombardo*. (Op. at 6).

The rule of *Lombardo* was applied in *Rumely v. McCarthy,* 250 U.S. 283 (1919), where the alleged offense was the failure to report the custody of alien property to the Alien Property Custodian within the period required by the Trading with the Enemy Act, 40 Stat. 411. The issue in *Rumely* was whether the defendant was properly detained and removed from New York by the United States Marshall pending his indictment in the District of Columbia.

Although defendant argued that he was not personally present in the District of Columbia at the time of the alleged offense, the Court held that his detention and removal were proper. The Court reasoned that the offense was the failure to make a report required by the Act, that there was a duty to make such a report in the District of Columbia, "and failure to make it was an offense against the United States committed in that District." 250 U.S. at 289.

The reasoning of *Lombardo* and *Rumely* has been adhered to consistently in this Court's later decisions. *See, e.g., Travis v. United States,* 364 U.S. 631, 633-37 (1961);

Johnston v. United States, 351 U.S. 215, 220-22 & n.5 (1956); *United States v. Anderson*, 328 U.S. 699, 705 n.14 (1946).

In its opinion below, the Fourth Circuit relies on certain provisions of legislative history which allegedly support the court's holding as to venue (Op. at 4-6) *See* Senate Report No. 1675, 89th Cong., 2nd Sess. (1966), *reprinted in* U.S. Code Cong. & Ad. News 3676, 3680-81. The legislative history relied upon, however, is not controlling here. Both the Report and its use by the court below are at variance with the plain language of Section 6091 of the Internal Revenue Code, the secretary's regulations, and the analysis of this Court in the cases discussed above.

II.

THE DECISION BELOW SO FAR SANCTIONS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Mr. Garman submits that the trial court's exclusion of two defense witnesses in a criminal prosecution where his intent was the issue in the case denied him his Sixth Amendment right to use compulsory process to offer the testimony of witnesses and his Fifth Amendment due process right to establish a defense to a criminal charge. In addition, it is apparent that the trial court's exclusion of evidence simply to permit the Court to shorten the time needed for testimony from two and a half days to two days was unwarranted and without justification.

It is plain that the trial court's exclusion of two defense witnesses implicates Mr. Garman's rights under the Sixth and Fifth Amendments. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *In Re Oliver*, 333 U.S. 257, 273 (1948). Writing for the Court in *Washington v. Texas*, 388 U.S. 14 (1967), Chief Justice Warren summarized concisely the

reasons why a criminal defendant's rights respecting the presentation of witnesses is jealously guarded:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

388 U.S. at 19. *See United States v. Nobles,* 422 U.S. 225, 230-31 (1975); *United States v. Nixon,* 418 U.S. 683, 709 (1974).

Mr. Garman recognizes that the right to call witnesses in defense of a criminal charge is not absolute. Nevertheless, "its denial or significant dimunition calls into question the ultimate 'integrity of the factfinding process' and requires that the competing interests be closely examined." *Chambers v. Mississippi,* 410 U.S. at 295 (involving right of confrontation), *quoting in part Berger v. California,* 393 U.S. 314, 315 (1969).

In this case the trial court did not exclude defense witnesses because the proffered witnesses were too numerous or their testimony would be irrelevant.[2] Instead, the trial court excluded the testimony of defense witnesses simply because their testimony would have interfered with the court's desire to have an additional forty-five minutes of testimony at a given time. *See, e.g., United States v. Goodwin,* 625 F.2d 693, 703-04 (5th Cir. 1980) (conviction reversed when trial judge refused to

[2] The Court of Appeals below recognized that the trial court did not even purport to apply the balancing test of Rule 403, Fed. R. Evid.

issue subpoena for character witness on ground that it would delay trial; testimony would not have caused undue delay). *Paoni v. United States,* 281 F.2d 801, 803-04 (3d Cir. 1922) (new trial required when court abused its discretion by refusing to grant a brief continuance to secure the attendance of two defense witnesses).

The central issue in the entire case was whether Mr. Garman's failure to file tax returns was willful. This crucial question was decided by the jury without the benefit of the testimony of Mr. Brooks and Mr. Bakas. These witnesses would have provided testimony consistent with Mr. Garman's lack of willful intent in failing to file returns. These witnesses also would have provided evidence corroborative of Mr. Garman's version of highly relevant events (particularly Mr. Garman's casualty losses and interest payments), as well as testified as to Mr. Garman's motives which had been attacked by the government. Thus, the excluded evidence was clearly admissible and relevant. The trial court, which found the issues in the case significant enough to justify a substantial period of incarceration, should not have amputated the defense purely as a matter of scheduling.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit.

Respectfully submitted,

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January 11, 1985

APPENDIX

United States Court Of Appeals
for the Fourth Circuit

No. 83-5014

United States of America,
Appellee,

versus

George Keith Garman,
Appellant.

Appeal from the United States District Court for the District of Maryland, at Baltimore. Alexander Harvey, II, District Judge. (CH H-82-00430)

Argued: Oct. 5, 1984 *Decided Nov. 13, 1984*

Before WINTER, Chief Judge, SPROUSE, Circuit Judge, and HAYNSWORTH, Senior Circuit Judge.

Paula M. Junghans (Ronald B. Rubin, Garbis & Schwait on brief) for Appellant; Glenda G. Gordon, Assistant United States Attorney (J. Frederick Motz, United States Attorney, Max H. Lauten, Assistant United States Attorney on brief) for Appellee.

WINTER, Chief Judge:

Defendant was convicted of the willful failure to file federal income tax returns for the years 1977-79 in

violation of 26 U.S.C. § 7203, and he appeals. He contends that he was improperly tried in the District of Maryland, that he was deprived of his rights under the Fifth and Sixth Amendments when he was denied a continuance in order to present additional witnesses, and that there was error in the district court's jury instructions.

We see no merit in any of these contentions, and we therefore affirm.

I.

Defendant resides in Baldwin, Maryland, and Maryland is within the internal revenue district which has a service center in Philadelphia, Pennsylvania. Defendant argues that the district court erred in denying his pretrial motion to dismiss for improper venue because the criminal act charged, the willful failure to file income tax returns, occurred in the Eastern District of Pennsylvania and not in the District of Maryland, where defendant was tried and convicted. Defendant relies on the well established rule that when a crime consists of a failure to act, the place fixed for performance of the act is the proper venue. *See, e.g.,* United States v. Rice, 659 F.2d 524, 526 (5 Cir. 1981); Bowles v. United States, 73 F.2d 772, 774 (4 Cir. 1934).

The places for filing non-corporate income tax returns are fixed by 26 U.S.C. § 6091(b)(1)(A), which provides that returns shall be made "(i) in the internal revenue district in which is located the legal residence . . . of the person making the return, or (ii) at a service center serving the internal revenue district referred to in clause (i)." The statute also authorizes the Secretary by regulations to designate the place of filing.

The Secretary has adopted regulations governing the place for filing income tax returns. 26 C.F.R. §§ 1.6091-1 *et seq.* The pertinent portion (§ 1.6091-2) is set forth in the

margin.[1] While the regulations seem unnecessarily obsure, we do read them to establish alternative places for filing individual tax returns: the internal revenue district where the taxpayer resides if the return is hand-carried, or the service center serving the internal revenue district

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[1] § 1.6091-2 Place for filing income tax returns.

Except as provided in § 1.6091-3 (relating to income tax returns required to be filed with the Director of International Operations) and § 1.6091-4 (relating to exceptional cases):

(a) Individual estates, and trusts.

(1) Except as provided in paragraph (c) of this section, income tax returns of individuals, estates and trusts shall be filed with the district director for the internal revenue district in which is located the legal residence or principal place of business of the person required to make the return, or, if such person has no legal residence or principal place of business in any internal revenue district, with the District Director at Baltimore, Md. 21202.

(2) An individual employed on a salary or commission basis who is not also engaged in conducting a commercial or professional enterprise for profit on his own account does not have a"principal place of business" within the meaning of this section.

(b) Corporations. Except as provided in paragraph (c) of this section, income tax returns of corporations shall be filed with the district director for the internal revenue district in which is located the principal place of business or principal office or agency of the corporation.

(c) Returns filed with service centers. Notwithstanding paragraphs (a) and b) of this section, whenever instructions applicable to income tax returns provide that the returns be filed with a service center, the returns must be so filed in accordance with the instructions.

(d) Hand-carried returns. Notwithstanding paragraphs (1) and (2) of section 6091(b) and paragraph (c) of this section:

(1) Persons other than corporations. Returns of persons other than corporations which are filed by hand carrying shall be filed with the district director (or with any person assigned the administrative supervision of an area, zone or local office constituting a permanent post of duty within the internal revenue district of such director) as provided in paragraph (a) of this section.

where the taxpayer resides if the return is mailed.[2] Thus we read the regulations adopted pursuant to § 6091 to prescribe two places of filing.

This reading of the regulations is consistent with the legislative history of the 1966 amendment to § 6091, which first authorized filing at a service center as an alternative and addition to the pre-existing requirement of filing within the district of residence. The purpose of the amendment, which authorized filing at places where the Internal Revenue Service had recently installed automatic data processing equipment, was to maximize use of such equipment and to speed the processing of returns and payment of tax refunds.

The Senate Report on this amendment specifically discusses venue in cases of willful failure to file under § 6091 as amended. The Report concluded that venue is proper in either the district of residence or the district where the service center is located.[3] Indeed, in connection

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[2] We distill this from the following reading of the regulation: Paragraph (a) says that, except as provided in paragraph (c), returns shall be filed in the district of residence. Paragraph (c) says that returns shall be filed with the service center serving the district of residence, but paragraph (d) says that notwithstanding the provisions of paragraph (c), hand-carried returns of persons other than corporations shall be filed in the district of residence.

[3] Senate Report No. 1625, 89th Cong., 2nd Sess. (1966), reprinted in U.S. Code Cong. & Ad. News 3676, 3680-81. The pertinent language of the report follows:

> Present law provides that the willful failure to file a tax return is a misdemeanor. For purposes of determining where a prosecution of this offense is to occur, present case law holds that the venue is to be in the judicial district in which the return was required to be filed.
>
> Under the bill, taxpayers are required to file returns in either of two judicial districts in the majority of cases. If they choose to mail their return, regulations may require that they be filed in the judicial district in which their service center is located. If they choose to file their return in person, by hand-carrying, they are required to file it at their district director's office. In most cases, the service

with the amendment of § 6091, Congress thought it appropriate to amend 18 U.S.C. § 3237 to provide that an individual prosecuted for willful failure to file in a district other than that of his residence has the right to have the case transferred to the district of his residence.[4]

We conclude that filing was required in either the District of Maryland or the Eastern District of Pennsylvania, and therefore defendant's willful failure to file was a crime committed in more than one district. Since 18 U.S.C. § 3237(a) provides that a crime committed in more than one district may be prosecuted in any district in which it was "begun, continued, or completed," the District of Maryland had venue here.[5]

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center and the district office will be located in different judicial districts. Since venue for a willful failure to file prosecution lies in either district, the Government under the bill could bring the prosecution in either district. (footnote omitted).

[4] The discussion of the Report on the amendment to § 3237 follows:

> Your committee agrees with the Committee on Ways and Means that a prosecution for willful failure to file a return should be brought as close to the defendant's residence as possible in order to avoid hardship to him, his attorneys, and witnesses. In this regard, it is this committee's understanding that the Government in practice will bring prosecutions for willful failure to file returns in the judicial district where the taxpayer resides (or the closest district possible). However, to be sure that the taxpayer has the right to be tried in the district in which he resides, the bill amends present law to provide that he may elect to remove his trial to the judicial district of his residence.

[5] We cannot refrain from calling attention to the anomalous result which would flow from adopting defendant's contention that venue was solely in the Eastern District of Pennsylvania, because defendant, under the provisions of § 3237(b), would have the absolute right to have his case transferred to the District of Maryland. If Maryland would not have venue in the first instance, it is difficult to understand why a transfer to Maryland would be authorized as a matter of right.

II.

We turn next to the contention that the district court's denial of a continuance denied defendant his constitutional rights and constituted reversible error.

Defendant's trial began on November 22, 1982, the Monday before Thanksgiving. The trial was not protracted because the sole contested issue was whether the failure to file was willful. At the end of the first day of trial the government reported that it had one more witness for its case in chief. The district court then told defense counsel to have her witnesses ready for the next day; defense counsel agreed with the district court that it was highly probable the case might conclude on Wednesday; and the district court advised counsel that it would sit later than usual on Tuesday.

On Tuesday, the second day of trial, the government completed its case before the midmorning recess. Defense counsel, in response to an inquiry from the district court, said that she planned to present two witnesses before lunch and two, including the defendant, after lunch. After the lunch recess, however, defense counsel reported that she intended to call three more witnesses on Wednesday. The district court reminded her that the court planned to sit late, and told her she should get her witnesses there that day because the taking of evidence would end once there was nothing more to present.[6]

Late in the afternoon, after presenting all available witnesses, defense counsel stated her desire to call Constantino Bakas and Charles Brooks as witnesses on Wednesday. The district court reminded her of its concern about the approaching Thanksgiving holiday and its desire to complete the case on Wednesday, pointing out that counsel had not earlier reported that Mr. Brooks

[6] Counsel was assisted at the trial by another lawyer who was free to leave the courtroom and communicate with the proposed witnesses.

could not be available on Tuesday. At the district court's suggestion, some of the evidence sought to be proven was stipulated, and certain legal documents were admitted into evidence. The government then presented its one available rebuttal witness, though it represented that it might have as many as five if the taking of evidence was extended into Wednesday. The taking of evidence concluded and the district court adjourned at about 5:30 p.m.

The government argues that the proposed additional evidence was only cumulative of what was already before the jury, and that the district court could therefore exclude the testimony under Federal Evidence Rule 403 because its probative value was substantially outweighed by "considerations of undue delay, waste of time, or needless presentation of cumulative evidence." As a technical matter we doubt that Rule 403 is applicable when the district court did not purport to exclude evidence under Rule 403, but instead denied a continuance so that the witnesses were not even called. Rather, it seems to us that the issue is whether the district court abused its discretion in denying a continuance. *See* Ungar v. Sarafite, 376 U.S. 575, 589 (1964). As a practical matter, what we must decide is the same under either test — was defendant foreclosed from presenting his complete defense by the district court's limitation on the taking of evidence? The question is largely a factual one, and it is to the facts that we turn.

The government amply proved for the years in question that defendant earned taxable income and that he failed to file income tax returns. The government showed that defendant's unpaid tax liability for the years in question was $28,700. Defendant himself conceded that for each of the years he knew that he was supposed to file tax returns, so the only contested issue for the jury was whether defendant's failure to file was willful.

The government proved that in 1978 defendant hired an accountant, Leonard Miller, to prepare defendant's 1977

tax return. Miller obtained three extensions for filing the return, and finally quit in January 1979 because defendant failed to provide him with sufficient information to prepare the return. There was evidence that during this same period defendant hired another accountant, Sylvan Offit, to prepare a personal net worth statement for use in refinancing some properties owned by defendant, and that defendant furnished the necessary data fast enough for the statement to be prepared within three weeks.

In 1978 defendant worked for JCB, Inc. and then for American Liner Corporation. While at American Liner he had Jerome Lichter, an accountant who worked there, obtain two extensions of time to file his 1978 return, but Lichter could not prepare the return because defendant never furnished the necessary information. Defendant then asked Charles Decker, a bookkeeper for American Liner, to prepare his 1977 and 1978 returns, but Decker could not do so with the information defendant supplied.

Defendant next sought help from Robert Thompson, an accountant, but Thompson could not get the files necessary to prepare a return. Finally, in April 1980, defendant went to Joseph Tarr and Mark Finley, who procured two extensions of time for filing the 1979 return. By December 1980, however, defendant had not paid their fee so they did not complete the return.

The IRS special agent who investigated defendant's case testified that when he interviewed defendant, the latter agreed to discuss his tax affairs. Defendant admitted that he had not filed returns and he took the agent to the office of Constantino Bakas (his attorney) and then to the office of his accountant, telling both to give the special agent whatever information he requested.

Garman's defense was that he did not act willfully because he thought that as a result of casualty and other

losses he owed little if any tax, and he had made good faith attempts to have returns prepared and filed. He showed that he was evicted from his home in January 1976 while he was away, and that when he returned, his tools, machinery, furniture and personal records were gone. Litigation ensued and defendant eventually won the right to buy the property, but it was in very damaged condition when he regained possession. He estimated his losses from the eviction were $100,000 and damage to the property approximately $20,000.

It was part of the government's proof that when defendant worked for American Liner, his annual salary was $104,000 but that no taxes were withheld because first he was treated as an independent contractor and then he claimed 102 exemptions. Defendant testified that he wanted to avoid withholding because of his substantial losses and that the number of exemptions claimed was fixed by employees of American Liner and not by him.

Against this factual background, defendant's counsel made the proffer set forth below.[7] Following the proffer,

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[7] MS. JUNGHANS: We proffer that Mr. Brooks is an attorney who was Mr. Garman's attorney prior to the formation of American Liner, who handled some of the litigation connected with the events of the eviction and regaining the property in Baldwin, Maryland.

He would testify also to the fact that Mr. Garman was considered an independent contractor with American Liner and that there was — that Mr. Brooks praticipated in the decision that it was appropriate not to have withholding from Mr. Garman's salary.

Mr. Bakas would testify as to some of the litigation he handled for Mr. Garman with respect to cattle, also being involved in some of the litigation with respect to the property and the regaining of the property in Baldwin, Maryland.

Mr. Bakas would also testify as to being visited by Special Agent Schmoll in the company of Mr. Garman and instructions he was given by Mr. Garman with respect to the cooperation with the Internal Revenue Service.

the district court received into evidence documentary evidence and stipulations to establish that defendant had filed suits (a) in 1976 regarding the eviction from his home, (b) in 1976 regarding damage to his property after his eviction, (c) in 1976 regarding an insurance claim for a stolen pump, and (d) in 1975 and 1976 regarding some cattle.

We do not think that the proffered evidence was of sufficient significance that we could conclude that the district court abused its discretion in denying the continuance or that defendant's right to present his entire defense was violated. There is nothing new in what defendant sought to present through the two witnesses. The fact that defendant, during his absence, was evicted from his home, lost property before he returned, sued to regain the right to occupy the property and regained it only in damaged condition, was amply proven. The fact that there was no withholding on defendant's salary from American Liner was not questioned and the reason for nonwithholding, that defendant claimed he had offsetting losses, was proven. Mr. Brooks' proferred testimony that he took part in the decision to withhold taxes would have added nothing because this advice was based, as defendant himself admitted, on his claim of offsetting losses. The validity of this claim could not be established through Mr. Brooks; it could only be proven from other sources.

Similarly, we think that the testimony of Mr. Bakas was of little significance. Documentary evidence already proved that there was litigation over cattle. Three witnesses — the defendant, the IRS agent, and an accountant — already proved that the defendant told Bakas to cooperate with the agent's investigation. Clearly, testimony from Bakas on these matters would be cumulative.

We therefore conclude that there was no reversible error in the district court's refusal to continue the taking of evidence to permit these witnesses to testify.

III.

In instructing the jury on the question of willfulness, the district court gave the standard instruction, but, at the government's request, added:

> A failure to file a tax return may be willful even if it is the result of procrastination, unless you find that such failure was accidental, inadvertent or negligent.

Defendant contends that the addition constituted reversible error because (a) it was an "unnecessary embellishment" that made the jury believe defendant was arguing procrastination as a defense, and (b) it may have led the jury to believe that the burden was on defendant, upon proof by the government of procrastination, to show that his conduct was not willful. We are not persuaded by either argument.

Giving the additional instruction was proper. It was a correct statement of the law. *See* United States v. Browney, 421 F.2d 48, 50 (4 Cir. 1970). In this case there was evidence of procrastination and, whether defendant intended to rely upon it or not, the government was entitled to have the jury told that procrastination was no defense. We do not read the additional instruction as purporting to shift the burden of proof.[8] Nor do we find any such implied meaning. The phrase "unless you find", read in context, was plainly meant only to distinguish procrastination from accidental, inadvertent or negligent conduct.

AFFIRMED.

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[8] Defendant lodged no objection to the instruction on this ground before the district court, so that our review is limited to a determination of whether there was plain error.